BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

2007 AUG -2 P 3: 30

In re Pet Foods Products Liability Litigation, MDL - 1850

3:07cv00159-LRH-VPC

BRIEF IN SUPPORT OF JOINT MOTION TO VACATE CONDITIONAL TRANSFER ORDER

Defendants Sunshine Mills, Inc., Menu Foods, Inc., and Wal-Mart Stores, Inc. ("Defendants") submit this Brief in Support of Joint Motion to Vacate Conditional Transfer Order pursuant to Rule 7.4(d) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. Defendants respectfully request that the Panel vacate its June 28, 2007 order conditionally transferring to this MDL the Picus v. Wal-Mart Stores, Inc. et al. case, number 2:07-cv-00682-PMP-LRL, and remand the case to the United States District Court for the District of Nevada. The Picus case involves fundamentally different questions of law and fact than the other cases in this MDL, so transfer will not conserve the resources of the parties, their counsel, and the judiciary.

BACKGROUND

On April 30, 2007, Plaintiff Margaret Picus ("Plaintiff") filed a complaint in the Eighth Judicial District Court of Clark County, Nevada seeking damages for Defendants' alleged violations of Nevada consumer protection statutes, unjust enrichment, and fraud. Specifically, the complaint alleges that Defendants violated the Nevada Consumer Fraud Act, Nev. Rev. Stat. Ann. § 41.600, and the Nevada Deceptive Trade Practices Act, Nev. Rev. Stat. Ann. § 598.0915,

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by intentionally mislabeling packages of Ol' Roy brand pet food as "Made in USA" when the pet food was not made entirely in the United States. Complaint at ¶¶ 29-30. The complaint also alleges that Defendants engaged in fraud by intentionally failing to disclose the true geographic origins of components of Ol' Roy brand pet food. Complaint at ¶ 38. Finally, the complaint alleges that Defendants were unjustly enriched by these actions. Complaint at ¶ 46.

The Picus complaint does not seek recovery for any alleged injury to a pet stemming from consumption of Defendants' products. Rather, it turns on the presence of a single imported ingredient in a single brand of pet food products and whether the presence of that ingredient renders the "Made in USA" label false and deceptive.

Plaintiff filed the complaint on behalf of herself and all similarly situated consumers nationwide who purchased Ol' Roy brand pet food products prior to March 16, 2007. Complaint at ¶ 21. The class proposed by the complaint therefore dates back to 2003, the limits of the relevant statutes of limitation. Plaintiff's Notice and Opposition to CTO at 2.

On April 25, 2007, the Picus case was removed to the United States District Court for the District of Nevada. On June 28, 2007, this Panel entered an order conditionally transferring the Picus case to this MDL "for the reasons stated in the order of June 19, 2007." In re Pet Food Prods. Liab. Litig., Docket No. 1850, Conditional Transfer Order (J.P.M.L. June 28, 2007). In the June 19 order, the Panel had transferred to the MDL a group of cases that "stem from the recall of pet food products allegedly tainted by melamine found in wheat gluten imported from China and used in these products." In re Pet Food Prods. Liab. Litig., 2007 U.S. Dist. LEXIS 45540 at *2 (J.P.M.L. June 19, 2007). The class of plaintiffs in these MDL cases consists of pet owners who purchased any of scores of brands of pet food products manufactured or offered for sale by Defendants between December 2006 and March 16, 2007, and whose pets were allegedly injured by consumption of that food. The Panel decided that these cases involved common questions of fact, so transferring the cases to the United States District Court for the District of New Jersey would eliminate duplicative discovery, avoid inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. Id.

On July 13, 2007, Defendants timely filed their Notice of Joint Opposition to the Conditional Transfer Order pursuant to Rule 7.4(c) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. Plaintiff also filed a Notice of and Opposition to Conditional Transfer Order on July 13. According to her Notice and Opposition, Plaintiff agrees with several of the points Defendants raise below regarding the legal and factual differences between the Picus case and the other cases in the MDL. Plaintiff states that the legal standards applicable to the Picus case are "wholly outside the scope of the product liability cases which comprise the MDL." Plaintiff's Notice and Opposition to CTO at 6. Plaintiff also agrees with Defendants that discovery in the Picus case will have nothing to do with injuries to pets. Plaintiff's Notice and Opposition to CTO at 5. Finally, Plaintiff agrees that the Picus case involves a much longer class period than the other MDL cases. Id.

Also on July 13, 2007, Plaintiff filed a Memorandum of Points and Authorities in Opposition to Menu Foods, Inc's Motion to Dismiss Complaint in the Picus case. The memorandum provides further evidence that the Picus case and the other MDL cases are legally and factually different. Notably, Plaintiff states that the claim asserted in the Picus case does not relate to the recall of specific lots of pet food products due to alleged contamination. Plaintiff's Memorandum in Opposition to Motion to Dismiss at 11.

ARGUMENT

The Panel has the authority to vacate its order conditionally transferring a case to an MDL "upon the showing of good cause by any party." In re Multidistrict Commodity Credit Corp. Litig. Involving Grain Shipments, 319 F. Supp. 533, 534 (J.P.M.L. 1970). In determining whether to vacate a conditional transfer order, "the Panel must weigh the interests of all the plaintiffs and all the defendants, and must consider the multiple litigation as a whole in the light of the purposes of the law." In re Multidistrict Civ. Antitrust Litig. Involving Antibiotic Drugs, 303 F. Supp. 1056, 1057 (J.P.M.L. 1969). Good cause to vacate a conditional transfer order exists when the case at issue and the other MDL cases do not share sufficient questions of law or fact. See In re Tri-State Water Rights Litig., 481 F. Supp.2d 1351, 1353 (J.P.M.L. 2007) (holding that claims related to the flow of one river were not sufficiently similar to claims related to the flow of another river); In re Multidistrict Private Civ. Treble Damage Antitrust Litig. Involving IBM, 316 F. Supp. 976, 977 (J.P.M.L. 1970) (holding that claims related to magnetic tape equipment were not sufficiently similar to claims related to electronic data processing equipment).

I. THE PICUS CASE SHOULD NOT BE A PART OF THIS PET FOODS PRODUCTS LIABILITY MDL BECAUSE IT DOES NOT SHARE COMMON QUESTIONS OF LAW WITH THE OTHER MDL CASES.

The Picus case should not be part of the Pet Foods Products Liability MDL because the questions of law involved in it are fundamentally different from those presented in the other cases in the MDL. Unlike the others, the Picus case is not a products liability case. It is essentially a consumer protection case that merely names the same defendants as those in the MDL. Resolving the Picus case will require a court to interpret and apply Nevada consumer protection and common law, and may also require analysis of the federal standards applicable to products labeled as "Made in USA." The other cases in the MDL, however, are products liability cases. Resolving these cases will require courts to interpret and apply standards for manufacturing consumer products and warning about their alleged dangers and to determine whether certain alleged damages are recoverable for injury to pets. Courts will have to determine whether Defendants satisfied these standards in manufacturing and offering for sale scores of brands of pet food products.

Because these questions of law are fundamentally different, keeping the Picus case in this MDL will actually frustrate one of the Panel's purposes in transferring cases to the MDL – conserving resources. The causes of action and legal standards have little overlap, and the parties and the Panel will use more resources to resolve the distinct issues of the Picus case than if the case is removed from the MDL and remanded.

II. THE PICUS CASE SHOULD NOT BE A PART OF THIS PET FOODS PRODUCT LIABILITY MDL BECAUSE IT DOES NOT SHARE COMMON QUESTIONS OF FACT WITH THE OTHER MDL CASES.

The Picus case also should not be part of the Pet Food Products Liability MDL because the questions of fact involved in it and the other cases in the MDL are fundamentally different. The Picus case does not relate to allegedly contaminated pet food products and related recalls. One of the most important characteristics of the other MDL cases is their limitation to the circumstances and effects of the alleged contamination of pet food products manufactured and offered for sale by Defendants. Because these cases have this common characteristic, considerable time and effort will be conserved by consolidating discovery of facts related to this alleged contamination. By contrast, the Picus case seeks damages for alleged misrepresentations in the labeling of a single brand of Defendants' pet food products. The circumstances of the alleged contamination of Defendants' pet food products are irrelevant in Picus. Instead, Picus turns on whether the presence of an imported ingredient – wheat gluten – in the pet food products renders the "Made in USA" labeling false and deceptive. Keeping the Picus case in this

MDL will again only frustrate one of the Panel's purposes in transferring cases to the MDL – conserving resources. Discovery will have to be expanded to accommodate the Picus case's unique claims, but Plaintiff will not benefit from consolidated discovery regarding the alleged contamination, and the parties to the other MDL cases will not benefit from discovery regarding labeling.

The Picus case is also significantly different from the other cases in the MDL because it does not involve injuries to pets. Just as described above regarding the alleged contamination of Defendants' pet food products, the parties to the other MDL cases will conserve time and effort by consolidating discovery related to the injuries to pets allegedly caused by Defendants' products. However, the circumstances of the alleged pet injury causation are irrelevant in the Picus case. Instead, Picus will require discovery of the damages caused to individual consumers by the alleged mislabeling of a single brand of pet food products. Whether the purchasers of the food even fed it to their pets has no bearing on the claims in Picus. No resources will be conserved by keeping the Picus case in the MDL because Plaintiff will not benefit from consolidated discovery regarding pet injuries, and the parties to the other MDL cases will not benefit from consolidated discovery regarding damages to consumers for allegedly deceptive business practices.

Finally, the Picus case is factually different from the other cases in the MDL because it does not involve the same class of plaintiffs. Most plaintiffs in the other MDL cases are pet owners who purchased Defendants' pet food products between December 2006 and March 16, 2007. Because the cases share this common characteristic, the parties will conserve resources by consolidating discovery related to Defendants' manufacturing and sales practices during this short period. The alleged duration of the class in the Picus case, however, is much longer. It includes consumers who purchased a brand of Defendants' pet food products beginning as early as 2003. Keeping the Picus case in the MDL will therefore do precisely the opposite of what the Panel transferred the cases to the MDL for in the first place. It will force the parties and the Panel to use more resources to complete discovery because the relevant time period will have been greatly expanded by the Picus class of plaintiffs.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Panel grant their joint motion, vacate the June 28, 2007 order conditionally transferring to this MDL the Picus v. Wal-Mart Stores, Inc. et al. case, number 2:07-cv-00682-PMP-LRL, and remand the Picus case to the United States District Court for the District of Nevada.

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